IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 25, 2006

STATE OF TENNESSEE v. ERIC A. DEDMON

Appeal from the Montgomery County Circuit Court
No. 40300788 John H. Gasaway, III, Judge

No. M2005-00762-CCA-R3-CD - Filed February 23, 2006

The Defendant, Eric A. Dedmon, was convicted by a Montgomery County jury of two counts of aggravated child abuse. On appeal, the Defendant asserts that: (1) the evidence presented at trial was insufficient to support a conviction for aggravated child abuse because the victim did not suffer a "serious bodily injury"; and (2) the trial court improperly sentenced the Defendant in light of Blakely v. Washington, 542 U.S. 296 (2004). Finding that there exists no reversible error, we affirm the judgments of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Roger E. Nell, Clarksville, Tennessee for the Appellant, Eric A. Dedmon.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Art Bieber, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant's conviction for two counts of aggravated child abuse pursuant to Tennessee Code Annotated section 39-15-402 (a)(1) (2003). At the Defendant's trial, the following evidence was submitted: Barney Reed, a paramedic with the Montgomery County Emergency Medical Services, testified that on October 19, 2002, at approximately 11:30 a.m., he and his partner, Heather Long, were dispatched to the Defendant's home on Winona Drive. When they

arrived they saw a very young child, M.D.,[1] who looked like he was grasping for something in mid-air, which was "very unusual for a child." He also said that M.D. was not crying, had a dazed look, and was breathing irregularly, "just kind of gasping for air." Reed described M.D. as having bruising on the back of his head, lower left side of his belly, and his right foot.

Heather Long, who is also with Montgomery County Emergency Medical Services, testified that, after examining M.D., she asked a police officer, who had responded to the scene, to examine M.D. because "[t]he baby had unusual bruises, not typical of a child that age."

During the State's proof, a letter written by the Defendant to his wife, describing how he injured M.D., was entered into evidence. The letter stated, in pertinent part:

> I don't understand why I did it. I know that it was because I took his crying and screaming personally. . . . I just took it out on him. I guess I thought if I gave him a reason to cry I wouldn't feel so bad, but the more I lashed out, the more unsatisfied I was. [Every time] you heard that funny cry, I was squeezing him. [Every time] you told me that I was burping [him] to[o] hard, I was hitting his back. I sometimes pressed his paci[f]ier into his mouth very hard, [and] I remember making his gums bleed one time and feeling nothing but numbness. When I squeezed him, sometimes it was a hug, sometimes with my hands. Other times I pressed a fist into his stomach while he was in his swing.
>
> I remember that Saturday. I remember waking up to his screaming and thinking "[y]eah, keep it up." I remember after you put him down after we had breakfast and when he woke up screaming while I was cleaning the living room. I got angry, wishing you weren't in the shower, thinking I should just let him scream, but then how mad you'd be at me if I had left him.
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> I went into his room and punched him in the stomach and then went back out to the living room and kept cleaning. He kept screaming and screaming. That's when I snapped. I flew into his room and hit him again in the stomach. I picked him up very fast and hard, squeezing him. I all but slammed him down on his changing table, just on the pad, he didn't hit any of the wood. I ripped his clothes open. I picked his ankles up and squeezed until one popped. I was very rough cleaning him with a wipe. I was very rough putting his legs down and I almost picked him completely up off the table by his feet when I went to put the new diaper on him. I snapped him back up and picked him up and slammed him into my chest with his head over my right shoulder. I tried to keep him from looking at my face by hitting his head into my shoulder (that's where the bruising came from).

[1] It is this Court's policy to use the victim's initials in child abuse cases.

> As I walked down the hall to the living room . . . I slammed [M.D.] down on the couch in a sitting position and punched his stomach again. When I did that, he bounced and landed back on the couch laying on his back. I then hit him twice more in the stomach and that is when he went limp and quit crying.
>
> I was so scared. I kept thinking ["]what have I done, what have I done?["] I kept trying to revive him. His eyes were half closed, he was breathing hard, and he wasn't moving anything. . . . I knew when the cop showed up at the house I was screwed, that I had done something very wrong. . . . The more evidence the doctors found, the more I knew I was screwed. I didn't want to admit that I had done this, but I had to. I didn't want you to go down for my fal[ts] as a husband, father, and provider.

Dr. Christopher Greeley, a general pediatric physician at Vanderbilt Medical Center who treated M.D., testified that he noticed an erratic pattern of bruises on M.D.'s body. Dr. Greeley said, "Bruising in a child less than about nine months or so is very, very concerning. If we look at the pediatric literature that describes babies, babies younger than about nine months shouldn't have any bruising, so any bruising at all was concerning." He further stated that a CAT scan revealed acute bleeding surrounding M.D.'s brain and said that this kind of bleeding usually indicates a serious amount of trauma. Additionally, a series of x-rays revealed that M.D. had six rib fractures on his left side, which were around two to four weeks old. He then testified that an examination by a pediatric ophthalmologist revealed hemorrhaging or bleeding in the back of M.D.'s eye, which is referred to as a retinal hemorrhage. The doctor said, "all fractures in babies are serious injuries. Posterior rib fractures in babies are also serious because they portend how they got there, which is a squeezing typically associated with shaking." The doctor also stated that, "hemorrhaging and the hematomas are serious in that they reflect a mechanism." Furthermore, the doctor testified that an MRI showed that M.D. had a contusion on the left back area of his brain, and offered that this was evidence that M.D.'s brain was injured. Then Dr. Greeley opined that:

> This constellation or this collection of findings is only seen in an inflicted injury, meaning most typically shaking or shaking with some form of impact. The child or baby hitting an object. There are no disease processes that look like this. There is no accidental event that really could give old rib fractures, retinal hemorrhages, and subdural hemorrhages.

When Dr. Greeley was asked if the type of injuries M.D. sustained could be fatal, he responded that about one quarter of babies die from such squeezing and shaking. He also testified that developmental disorders occurred in around two-thirds of babies with these types of injuries and that the developmental disorders ranged from "minor behavioral problems to persistent seizures and persistent coma." The doctor indicated that around one in ten infants would be physically normal after suffering the kinds of injuries M.D. suffered.

On cross examination, the doctor acknowledged that, although the literature reflects a certain probability of on-going problems based on injuries like those suffered by M.D., the doctor has had

no contact with M.D. because M.D. was discharged from the hospital and the doctor is not aware of M.D.'s current condition. Dr. Greeley also said that in most cases rib fractures heal without problems and that most of the time retinal hemorrhaging resolves itself without any intervention. Specifically the doctor did not believe that M.D. would need surgery on his eye, but was not aware of whether any surgical procedure was in fact performed on M.D.'s eye. Dr. Greeley also indicated that most subdural hematomas resolve themselves, but stated that they are more a marker of whether the brain has been injured. According to Dr. Greeley's testimony, the neurosurgeons who attended to M.D. did not believe that draining was necessary to treat M.D.'s head injury.

Dr. Greeley agreed that there were no readily apparent signs of external injury to M.D. by the time he was discharged from the hospital and that he had no disfigurements. The doctor also allowed that he was not aware of any specific long-term injuries suffered by M.D., stating that he "tr[ies] not to predict at all."

M.D.'s mother, Holly Dedmon, testified that a few weeks before M.D. was admitted to the hospital she had admonished the Defendant about burping M.D. too hard when she noticed bruises on M.D.'s spine. She said that, a few days after that, the Defendant went away for work for a period of time, and during that time:

> [M.D.] cried continually day and night for about a week. If you picked him up, I would pick him up under his arms and he would scream, he was in so much pain. He would pull his arms over his head and would cry if you tried to put them down. He – if something startled him, he would just start screaming, like he would jump and then start screaming, so I felt something had to be wrong with him.

Dedmon testified that she could feel a popping in M.D.'s shoulder when she tried to put his arms down, so she took him to Blanchfield Hospital. She said that the doctor could not get M.D. settled, and she asked him to give M.D. an x-ray. The doctor declined to x-ray M.D., said to give him Tylenol and Motrin, and to bring him back in three days. Dedmon then testified that she brought M.D. back three days later and, although the Tylenol seemed to be helping, M.D. was still in a great deal of pain. She said that M.D. had been unable to keep food down and did not like being picked up under his arms. She again requested that x-rays be performed on M.D., but, again, the doctor declined to x-ray M.D. She said that, because M.D. was rejecting her breast milk, the doctor had her try five different types of formula, all of which were also rejected.

On cross-examination, Dedmon identified a report from the Pediatric Assessment Clinic in Oregon which was dated November 21, 2002, roughly one month after the date of M.D.'s hospitalization. The report stated that M.D.'s gross motor skills appear to be at or approaching his age level, and his fine motor abilities, cognitive abilities, language development, social behaviors, and self development appear to be typical for his age.

Based upon this evidence, the jury found the Defendant guilty of two counts of aggravated child abuse. The trial court sentenced the Defendant to twenty years on each count, to be served concurrently, in the Tennessee Department of Correction.

II. Analysis

On appeal, the Defendant asserts that: (1) the evidence presented at trial was insufficient to support a conviction for aggravated child abuse because the victim did not suffer a "serious bodily injury"; and (2) the trial court improperly sentenced the Defendant in light of Blakely v. Washington, 542 U.S. 296 (2004).

A. Serious Bodily Injury

The Defendant's first assertion is that the evidence presented at trial was insufficient to support a conviction for aggravated child abuse because the victim did not suffer a "serious bodily injury." When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

The offense of aggravated child abuse is committed if a person commits the offense of child abuse or neglect and the "act of abuse or neglect results in seriously bodily injury to the child." Tenn. Code Ann. § 39-15-402(a)(1). The offense of child abuse or neglect is committed by "[a]ny person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare . . . ." Tenn. Code Ann. § 39-15-401(a) (2003). Serious bodily injury involves "(A) a substantial risk of death; (B) protracted unconsciousness; (C) extreme physical pain; (D) protracted

or obvious disfigurement; or (E) protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(34) (2003). The offense of aggravated child abuse is a Class A felony if the victim is six years of age or less. Tenn. Code Ann. § 39-15-402(b).

The Defendant asserts that none of the forms of injury enumerated in Tennessee Code Annotated section 39-11-106(a)(34) apply to the victim in this case, and, thus, the Defendant's convictions should be overturned. It is also the Defendant's position that the State relied heavily upon Dr. Greeley's testimony that "all fractures . . . are serious bodily injury," that "[p]osterior rib fractures in babies are also serious because they portend how they got there," and that "hemorrhaging and the hematomas are serious in that they reflect a mechanism." The Defendant posits that these statements do not comport with the statutory definition of serious bodily injury. The State argues that there was sufficient evidence for the jury to return a guilty verdict based upon section (A) "substantial risk of death" and section (C) "extreme physical pain." See Tenn. Code Ann. § 39-11-106(a)(34).

1. Substantial Risk of Death

Viewing the evidence in a light most favorable to the State, it establishes that M.D. had roughly a 25% risk of death as a result of the injuries inflicted by the Defendant. It is the Defendant's contention that references to statistics and literature on the probability of death should not be used to determine the risk of death, in satisfaction of the seriousness of the injury component of Tennessee Code Annotated section 39-15-402 (a)(1).

We note that the jury, not the appellate court, has the prerogative of choosing those witnesses to believe and of determining the weight to be assigned to their testimony. The jury, not the appellate court, has the prerogative of drawing inferences from the evidence. As an appellate court, we merely review the evidence in the light most favorable to the state, indulging the state the benefit of all reasonable inferences, to determine whether any reasonable jury could have found the defendant guilty beyond a reasonable doubt. After making this examination, we conclude that Dr. Greeley's testimony that 25% of all children with injuries comparable to M.D.'s would die as a result of their injuries was sufficient evidence to support the jury's inference that M.D. suffered a substantial risk of death. This issue is without merit.

2. Extreme Physical Pain

This Court has previously defined "extreme physical pain" as pain severe enough "to be in the same class as an injury which involves a substantial risk of death, protracted unconsciousness, protracted or permanent disfigurement or the loss or impairment of the use of a bodily member, organ or mental faculty." State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995). In Sims, the Court went on to indicate that pain is difficult to quantify or measure. Id. However, it is this Court's opinion that the subjective nature of pain is a question of fact to be determined by the trier of fact, in this case the jury. In coming to this conclusion we have adopted the reasoning from State v.

Barnes, 954 S.W.2d 760, 765-66 (Tenn. Cr. App., 1997), where this Court articulated the standard for determining the difference between "bodily injury" and "serious bodily injury." In Barnes, the Court said:

> While the phrase "serious bodily injury," an essential element of the offense of aggravated assault, is not susceptible to precise legal definition, it must describe an injury of a greater and more serious character than that involved in a simple assault. The distinction between "bodily injury" and "serious bodily injury" is generally a question of fact for the jury and not one of law.

Id. The difference between "physical pain" and "extreme physical pain" is analogous to the difference between "bodily injury" and "serious bodily injury," and as such, determining the severity of pain suffered is within the province of the jury.

At trial, evidence was presented that M.D. cried continually, night and day, for a week, could not keep food down, and held his arms above his head and would scream when touched under his arms or if his arms were pulled down, due to his broken ribs. This evidence was sufficient for a reasonable jury to find that the victim suffered extreme physical pain. This issue is without merit.

B. Blakely v. Washington

When a defendant challenges the length or manner of service of a sentence, it is the duty of this Court to conduct a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "'conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001) (quoting State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or statutory enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Comm'n Cmts.

In sentencing the Defendant, the trial court applied three enhancement factors. One, the victim was particularly vulnerable because of his age. See Tenn. Code Ann. § 40-35-114(4) (2003).

Two, the Defendant had no hesitation about committing a crime when the risk to human life was high. See Tenn. Code Ann. § 40-35-114(10). And three, the Defendant abused a position of trust. See Tenn. Code Ann. § 40-35-114(15). The trial court also found two mitigating factors. First, that the Defendant accepted responsibility and acknowledged his culpability, and second, that the Defendant expressed genuine remorse. See Tenn. Code Ann. § 40-35-113(13) (2003).

In the case under submission, we conclude that there is ample evidence that the trial court considered the sentencing principles and all relevant facts and circumstances. Therefore, we review its decision de novo with a presumption of correctness. Accordingly, so long as the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the factual record, this Court may not disturb this sentence even if we would have preferred a different result. See Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Cmts; State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We note that the defendant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; Ashby, 823 S.W.2d at 169.

The Defendant contends that his sentence should be set aside and the case remanded to the trial court to consider the Defendant for especially mitigated offender status, because the enhancement factors must be either admitted by the Defendant or found by a jury determination beyond a reasonable doubt in light of Blakely v. Washington, 542 U.S. 296 (2004). Recently, the Tennessee Supreme Court concluded that Blakely does not apply to Tennessee's sentencing scheme because "the Tennessee Criminal Sentencing Reform Act does not authorize a sentencing procedure which violates the Sixth Amendment right to jury trial." State v. Gomez, 163 S.W.3d 632, 651 (Tenn. 2005). Thus, Blakely v. Washington does not bar the trial court from enhancing the Defendant's sentence pursuant to Tennessee Code Annotated section 40-35-114, and the Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing, we conclude that the trial court did not commit reversible error. Therefore, the judgment of the trial court are affirmed.

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ROBERT W. WEDEMEYER, JUDGE